

CAUSE NO. DC-1211591

TAMMY WEAVER, INDIVIDUALLY
AND AS REPRESENTATIVE OF THE
ESTATE OF TERRY WEAVER, DECEASED
AND DEREK WEAVER

VS.

HARRISON HOIST, INC., DOING BUSINESS
AS HARRISON CRANE & HOIST, INC.,
HUNT CONSTRUCTION GROUP

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

68TH JUDICIAL DISTRICT

**PLAINTIFFS' RESPONSE TO DEFENDANT HUNT CONSTRUCTION GROUP'S HYBRID
MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Tammy Weaver, Individually and as Representative of THE ESTATE OF TERRY WEAVER, DECEASED, and DEREK WEAVER (hereinafter "Plaintiffs"), and files this, their response to Defendant Hunt Construction Group's (hereinafter "Hunt") pursuant to Rule 166a of the Texas Rules of Civil Procedure. In support of same, Plaintiffs would respectfully show as follows.

FACTUAL BACKGROUND

Mr. Weaver's Death

On July 7, 2012, a Harrison Hoist, Inc. ("Harrison") crew was dismantling a tower crane that had been used in a University of Texas – Dallas campus construction project overseen by contractor Hunt Construction Group ("Hunt").¹ After the upper crane had been removed, the workers were dismantling the 67-meter tower by unscrewing bolts.² To save time, as many as six out of eight bolts were removed at every section, with remaining bolts being loosened.³ Terry Weaver and another worker remained at the top of the crane to rig the tower sections to the mobile assist crane.⁴ The investigation demonstrated

¹ Terex Crane Incident Peiner SK415 – Investigation Report at ¶2 (Aug. 17, 2012), attached as Ex. A.

² Terex Crane Incident Peiner SK415 – Investigation Report at ¶2 (Aug. 17, 2012), attached as Ex. A.

³ Hurst Metallurgical Research Laboratory, Inc. Preliminary Investigation at ¶3b, attached as Ex. B.

⁴ Hurst Metallurgical Research Laboratory, Inc. Preliminary Investigation at ¶3c, attached as Ex. B.

that “the mast bolts of several tower sections [being] partially remove[d] corrupted the entire stability of the tower.”⁵ After strong winds came, the tower collapsed, killing Terry Weaver and another worker.⁶

Failure to Properly Dismantle the Crane

While it may seem obvious that six out of eight bolts should not be removed from the sections of a 67-meter tower while workers are still atop the tower, multiple investigations were of course conducted into these tragedies. These investigations revealed several root causes, including:

- No written procedures detailed the proper assembly of the crane for the Harrison crew;⁷
- The mast bolts were not all in place and tightened;
- If the mast bolts had been in place and tightened, there would have been no collapse without the wind;
- Even with the wind, the tower would not have collapsed if the mast bolts were in place on the diagonal of the sections.
- Even with the wind and with mast bolts in place only on the leeward side, the tower would not have collapsed if the bolts were tightened correctly.⁸

After its own investigation, OSHA found several violations causative to these deaths, including:

- A serious violation that the assembly/disassembly director supervising the assembly/disassembly operation did not address the hazards associated with the operation, including the effect of wind speed and weather on the equipment;⁹
- A serious violation for failure to use manufacturer procedures for assembly/disassembly, which did not prevent unintended dangerous movement and collapse of the mast, provide adequate support and stability to the mast, or minimize workers’ exposure to collapse of the crane;¹⁰ and
- A serious violation for using employer procedures not developed by a qualified person (a professional engineer, including an engineering analysis of all existing and potential forces).¹¹
- Serious violation for failure to train workers regarding the requirements of OSHA crane regulations applicable to their respective roles;¹²

⁵ Terex Crane Incident Peiner SK415 – Investigation Report at ¶4 (Aug. 17, 2012), attached as Ex. A.

⁶ Terex Crane Incident Peiner SK415 – Investigation Report at ¶2 (Aug. 17, 2012), attached as Ex. A.

⁷ Hurst Metallurgical Research Laboratory, Inc. Preliminary Investigation at ¶4.3, attached as Ex. B.

⁸ Terex Crane Incident Peiner SK415 – Investigation Report at ¶5 (Aug. 17, 2012), attached as Ex. A.

⁹ OSHA Citation and Notification of Penalty at 6 (Nov. 20, 2012), attached as Ex. C.

¹⁰ OSHA Citation and Notification of Penalty at 7-9 (Nov. 20, 2012), attached as Ex. C.

¹¹ OSHA Citation and Notification of Penalty at 10 (Nov. 20, 2012), attached as Ex. C; OSHA Investigation No. 508219 at 2, (excerpts) attached as Ex. D.

¹² OSHA Citation and Notification of Penalty at 11 (Nov. 20, 2012), attached as Ex. C.

No written procedures were provided to the Harrison laborers for proper disassembly of the crane by either Harrison or Hunt.¹³ Alberto Almoguerra, tower crane technician for Harrison,¹⁴ testified that Harrison's usual practice was to totally remove six of the bolts in every connection, and to leave two in the diagonal remaining legs.¹⁵ Almoguerra admitted that this obviously was not a stable configuration because it fell.¹⁶ Obviously, if there are eight points of connection, and six are completely removed and the remaining two loosened, the stability decreases.¹⁷

Hunt knew bolts were being removed and that the weather had become dangerously windy. There can be no better evidence of this than the fact that Hunt's assistant superintendent took pictures the day of the incident and shortly before the collapse that clearly show both dark clouds and the removal of bolts:¹⁸



¹³ Hurst Metallurgical Research Laboratory, Inc. Preliminary Investigation at ¶1.4, attached as Ex. B.

¹⁴ Deposition of Alberto Almoguerra at 50:14-17 (Feb. 10, 2014), attached as Ex. E.

¹⁵ Deposition of Alberto Almoguerra at 31:23-32:19, 92:1-13 (Feb. 10, 2014), attached as Ex. E.

¹⁶ Deposition of Alberto Almoguerra at 92:15-23 (Feb. 10, 2014), attached as Ex. E.

¹⁷ Deposition of Alberto Almoguerra at 92:24-93:9 (Feb. 10, 2014), attached as Ex. E.

¹⁸ Deposition of David Briones at 54:16-22, 109:24-110:111:6 (Sept. 5, 2013), attached as Ex. F; July 7, 2012 Photographs, attached as Ex. G.

The photographs, taken by Hunt's own agent shortly before the collapse, clearly demonstrate the removal of the bolts (green arrows pointing to black area show bolts installed; red arrows pointing to empty spaces show removal of bolts [*arrows drawn for demonstrative purposes for this response*]):



In other words, because Hunt was supervising the project closely enough to take progress pictures, the very problems that caused the tower collapse could literally be seen through the viewfinder of Hunt's camera.

Jack Keller, Harrison's crane dismantling supervisor, also testified that Hunt's safety manager, Jakarylton Brunson, participated in the safety meeting the morning of the collision.¹⁹ From Keller and Brunson's discussion in the safety meeting, Keller understood that Hunt through Brunson would be monitoring the weather.²⁰ Keller "relay[ed] to Hunt the way in which [Harrison was] planning on dismantling the tower crane" during this safety meeting, and Hunt did not correct the procedure.²¹ Keller said it was "fair to say that Hunt was aware of [Harrison's] procedures for dismantling the tower crane prior to" Harrison's beginning work on the day of the deaths.²² Keller also did not recall Hunt inquiring about whether Harrison's agents were trained at all on the new OSHA regulations applying to dismantling the crane.²³ Although he was the supervisor for the crane assembly, Keller himself testified that he believed standard industry procedure was to untorque the bolts, leaving two bolts "catty-corner as you come down."²⁴ However, while he knew that a tower crane collapse would provide an extreme degree of risk of significant injuries and death,²⁵ Keller indicated that he "did not know" what effect it would have on the tower's ability to handle a wind load if the bolts were removed catty-corner.²⁶ Keller acknowledged that if he were dismantling the crane now, he would not have taken out the bolts in the same manner.²⁷

A job hazard analysis ("JHA") was in fact submitted to Hunt by Harrison for the dismantling of the subject crane.²⁸ This JHA specifically referenced "untorquing" of the bolts, and referred to the

¹⁹ Deposition of Jack Keller at 49:22-551:19 (Feb. 10, 2014), attached as Ex. H.

²⁰ Deposition of Jack Keller at 49:22-50:25 (Feb. 10, 2014), attached as Ex. H.

²¹ Deposition of Jack Keller at 54:5-22 (Feb. 10, 2014), attached as Ex. H.

²² Deposition of Jack Keller at 55:8-12 (Feb. 10, 2014), attached as Ex. H.

²³ Deposition of Jack Keller at 45:2-10 (Feb. 10, 2014), attached as Ex. H.

²⁴ Deposition of Jack Keller at 101:18-102:4 (Feb. 10, 2014), attached as Ex. H.

²⁵ Deposition of Jack Keller at 89:9-90:4 (Feb. 10, 2014), attached as Ex. H; Deposition of Alberto Almoguerra at 73:4-1 (Feb. 10, 2014), attached as Ex. E.

²⁶ Deposition of Jack Keller at 108:5-15 (Feb. 10, 2014), attached as Ex. H.

²⁷ Deposition of Jack Keller at 116:23-117:6 (Feb. 10, 2014), attached as Ex. H.

²⁸ Job Hazard Analysis, attached as Ex. I.

manufacturer's manual for the tower crane.²⁹ The operating manual for this crane provides instructions on the dismantling of the tower sections.³⁰ This manufacturer's manual for the tower crane was actually kept in Hunt's safety manager's office.³¹ OSHA noted that the manufacturer instructs that "the connecting elements (mast bolts) are to be removed between the tower section which is to be dismantled and the tower section which is placed underneath," which obviously would have prevented Mr. Weaver's death.³²

Failure to Recognize Dangerous Weather Patterns

The operating manual for this crane also requires that crane operation be stopped "whenever wind forces are prejudicial to safety."³³ This is defined as winds of 20 miles per hour or more.³⁴ As a result, weather monitoring is critical to the safety of the workers on a tower crane, as Mr. Weaver's death demonstrates. And this was no freak gust. Bryan K. Rappolt, Plaintiff's meteorological expert, performed a meteorological analysis of the weather at the scene on the date of the incident.³⁵ His conclusion was that "[a] wind of this velocity is a common occurrence at and in the proximity of the [location of the incident] on an annual basis."³⁶ At approximately 2:57 p.m., weather data showed scattered clouds with gusts of winds of 21.9 mph.³⁷ Rappolt indicated that a peak 3-second wind gust velocity of approximately 41-43 mph occurred sometime between 3:17 p.m. and 3:18 p.m. on the date of the incident, with sustained winds ranging from 31 to 35 mph.³⁸ OSHA noted that "dark clouds" were

²⁹ Deposition of Jukarylton Brunson at 30:16-31:9 (Sept. 5, 2013), attached as Ex. J.

³⁰ Terex Operating Manual at 08.64 (Harrison 458), (excerpts) attached as Ex. K.

³¹ Deposition of Jukarylton Brunson at 107:7-9 (Sept. 5, 2013), attached as Ex. J.

³² OSHA Investigation No. 508219 at 4, (excerpts) attached as Ex. D.

³³ Terex Operating Manual at 00.03 (Harrison 155), (excerpts) attached as Ex. K.

³⁴ Terex Operating Manual at 00.03 (Harrison 155), (excerpts) attached as Ex. K.

³⁵ "Meteorologist Analysis and Meteorological Variable Estimation July 7th, 2012 at and in the Proximity to the University of Texas in Richardson, Texas," Bryan K. Rappolt (May 28, 2013), attached as Ex. L.

³⁶ "Meteorologist Analysis and Meteorological Variable Estimation July 7th, 2012 at and in the Proximity to the University of Texas in Richardson, Texas," Bryan K. Rappolt at 8 (May 28, 2013), attached as Ex. L.

³⁷ OSHA Investigation No. 508219 at 4, (excerpts) attached as Ex. D.

³⁸ "Meteorologist Analysis and Meteorological Variable Estimation July 7th, 2012 at and in the Proximity to the University of Texas in Richardson, Texas," Bryan K. Rappolt at 8 (May 28, 2013), attached as Ex. L.

visible as early as 3:06 pm in photographs of the dismantling in the very pictures Hunt agents took.³⁹ OSHA's investigation demonstrated that by 3:09 pm, "clouds had moved into the area and the sky was dark."⁴⁰

Hunt agents were responsible for monitoring the weather.⁴¹ Hunt did monitor the weather immediately before and in fact during the crane falling.⁴² Immediately before the Crane fell, David Briones, assistant superintendent for this job at Hunt Construction,⁴³ observed dark clouds rolling into the work area.⁴⁴ Photographs Briones took at the scene bear this out.⁴⁵ Operations were supposed to stop in the event of rain or wind under Hunt protocol.⁴⁶ Briones agreed that it was important to "continually monitor the weather in order to determine whether or not crane operation could continue."⁴⁷ Jukarylton Brunson, safety manager with Hunt,⁴⁸ first noticed the weather because "dirt was flying by" the window of his office.⁴⁹ He noticed a "pretty heavy wind pick up" and then saw the tower crane fall.⁵⁰ Brunson indicated that Hunt first noticed the change in weather immediately before the crane's fall; however, Keller testified that the conversation with Hunt about the weather took place more than an hour prior to the collapse.⁵¹ Harrison employees affirmed that Brunson (with Hunt) was responsible for monitoring the weather.⁵²

³⁹ OSHA Investigation No. 508219 at "Photograph Mounting Sheet", (excerpts) attached as Ex. D.

⁴⁰ OSHA Investigation No. 508219 at 4, (excerpts) attached as Ex. D.

⁴¹ Deposition of Jack Keller at 49:22-50:4 (Feb. 10, 2014), attached as Ex. H; Deposition of Alberto Almoguerra at 95:17-96:2, 128:21-129:11, 29:13-16, 130:15-18 (Feb. 10, 2014), attached as Ex. E.

⁴² Deposition of David Briones at 44:1-19 (Sept. 5, 2013), attached as Ex. F.

⁴³ Deposition of David Briones at 12:22-13:4 (Sept. 5, 2013), attached as Ex. F.

⁴⁴ Deposition of David Briones at 46:4-10 (Sept. 5, 2013), attached as Ex. F.

⁴⁵ Deposition of David Briones at 55:12-18 (Sept. 5, 2013), attached as Ex. F; July 7, 2012 Photographs, attached as Ex. G.

⁴⁶ Deposition of David Briones at 75:2-12 (Sept. 5, 2013), attached as Ex. F.

⁴⁷ Deposition of David Briones at 78:19-22 (Sept. 5, 2013), attached as Ex. F.

⁴⁸ Deposition of Jukarylton Brunson at 12:20-24 (Sept. 5, 2013), attached as Ex. J.

⁴⁹ Deposition of Jukarylton Brunson at 57:21-22 (Sept. 5, 2013), attached as Ex. J.

⁵⁰ Deposition of Jukarylton Brunson at 60:1-23 (Sept. 5, 2013), attached as Ex. J.

⁵¹ Deposition of Jack Keller at 78:9-25 (Feb. 10, 2014), attached as Ex. H.

⁵² Deposition of Alberto Almoguerra at 95:17-96:2, 128:21-129:11, 29:13-16, 130:15-18 (Feb. 10, 2014), attached as Ex. E.

Hunt Controlled the Worksite and Harrison's Safety Practices

The general contractor for the job was movant Hunt, which contracted with Harrison.⁵³ Hunt contractually retained and in fact exercised extensive control over Harrison's safety measures. The "Project Safety Requirements" with UT Dallas required that "[t]he Contractor (Hunt) shall bear overall responsibility for all aspects of safety at the Project."⁵⁴ The project safety coordinator role for Hunt "include[d] authority to direct actions of subcontractors and to stop work operation whenever any worker is exposed to a risk that can be reduced or eliminated."⁵⁵ The first page of Hunt's Project Safety Program states that Hunt "will not accept substandard safety performance from any entity, either by group or individual, that would sacrifice the safety of a worker."⁵⁶ Hunt emphasized that "[i]t shall be a goal of all levels of management and supervision to instill a safety culture that will encourage all workers onside to take pride in the fact that they are on a project that is committed to their safety."⁵⁷ Specifically, "[a]t Hunt...protecting the public, subcontractor employees, and our employees are the most important part of any work we do."⁵⁸ Hunt promised to "meet or exceed applicable standards, including...Current OSHA CFR 29 1926 including 11-8-2010 OSHA 1926.550 Update For Cranes."⁵⁹

Hunt contractually retained the right in its contract with Harrison to:

- **Order Harrison to remove any Harrison employee that Hunt deemed to be unsatisfactory;**⁶⁰
- **Approve Harrison's staff for the job after review of their qualifications;**⁶¹

⁵³ Subcontract Agreement (Nov. 7, 2011), attached as Ex. M.

⁵⁴ Section 01 35 23 – Project Safety Requirements at 1.4.1 (Apr. 20, 2009), attached as Ex. N.

⁵⁵ Section 01 35 23 – Project Safety Requirements at 3.2.2 (Apr. 20, 2009), attached as Ex. N.

⁵⁶ Stage 1 Demolition / Utility Relocation Project Safety Program at "Forward" (Jul. 15, 2011), attached as Ex. O.

⁵⁷ Stage 1 Demolition / Utility Relocation Project Safety Program at "Forward" (Jul. 15, 2011), attached as Ex. O.

⁵⁸ Stage 1 Demolition / Utility Relocation Project Safety Program at 3 (Jul. 15, 2011), attached as Ex. O.

⁵⁹ Stage 1 Demolition / Utility Relocation Project Safety Program at 3 (Jul. 15, 2011), attached as Ex. O.

⁶⁰ Subcontract Agreement at 11.1 (Nov. 7, 2011), attached as Ex. M.

⁶¹ Subcontract Agreement at 11.3 (Nov. 7, 2011), attached as Ex. M.

- **Require Harrison to submit a “submittal log and schedule, which shall be updated weekly, showing the status of all required shop drawings, samples, and other required submittals”;**⁶²
- **Require Harrison to submit a safety plan;**⁶³
- **Order Harrison to stop any work that Hunt deems unsafe until corrective measures acceptable to Hunt have been implemented;**⁶⁴
- Modify the project schedule;⁶⁵
- Require a daily report form completed every working day;⁶⁶
- Order Harrison to increase its manpower;⁶⁷ and
- Require drug testing.⁶⁸

Multiple Hunt superintendents had the duty to exercise and in fact did exercise control over subcontractor safety on this job. The Hunt project manager had the responsibility under the project safety program to review the Subcontractors Site Safety Program, to be involved in each pre-construction meeting, to identify hazards and review subcontractor safety programs (which must have met or exceeded Hunt’s, UT Dallas’s, the UT System, and OSHA requirements.”⁶⁹ The Hunt superintendent, Robert Olsen,⁷⁰ had the contractual responsibilities under the project safety program to participate in pre-construction meetings with subcontractors; review subcontractor safety submittals; discuss safety in weekly subcontractor progress meetings; and “assist in enforcing employee and subcontractor safety compliance.”⁷¹ Olsen admitted that one of his job duties was to monitor subcontractors and stop work if it was being done in an unsafe manner.⁷² He specifically admitted he had the duty and the authority to correct unsafe subcontractor behavior.⁷³

⁶² Subcontract Agreement at 12.1 (Nov. 7, 2011), attached as Ex. M.

⁶³ Subcontract Agreement at 25.1 (Nov. 7, 2011), attached as Ex. M.

⁶⁴ Subcontract Agreement at 25.1 (Nov. 7, 2011), attached as Ex. M (along with a self-serving sentence that exercise of this control should not be construed as control).

⁶⁵ Subcontract Agreement at 9.4 (Nov. 7, 2011), attached as Ex. M.

⁶⁶ Subcontract Agreement at 9.6 (Nov. 7, 2011), attached as Ex. M.

⁶⁷ Subcontract Agreement at 9.7 (Nov. 7, 2011), attached as Ex. M.

⁶⁸ Subcontract Agreement at 25.5 (Nov. 7, 2011), attached as Ex. M.

⁶⁹ Stage 1 Demolition / Utility Relocation Project Safety Program at 6 (Jul. 15, 2011), attached as Ex. O.

⁷⁰ Deposition of Robert Olsen at 11:3-7 (Sept. 6, 2013), attached as Ex. P.

⁷¹ Stage 1 Demolition / Utility Relocation Project Safety Program at 7 (Jul. 15, 2011), attached as Ex. O.

⁷² Deposition of Robert Olsen at 16:10-18 (Sept. 6, 2013), attached as Ex. P.

⁷³ Deposition of Robert Olsen at 16:24-17:6 (Sept. 6, 2013), attached as Ex. P.

Jukarylton Brunson, safety manager with Hunt,⁷⁴ also admitted that his daily inspection of a work site is to “mak[e] sure that everybody is following the rules...jobsite rules...OSHA regulations, company policies, things like that.”⁷⁵ He specifically stated, “[a]gain, I do monitor the work of the subcontractors onsite.”⁷⁶ He emphasized when he ensures that workers are following the rules that he meant “everybody that walks onsite,” not merely Hunt employees.⁷⁷ He specifically stated that this included the subcontractors and the work that they were performing, as well as whether the job in general was OSHA-compliant.⁷⁸ Brunson testified that Hunt conducted a daily safety orientation for all contractors.⁷⁹ Brunson also testified that he reviewed job hazard analysis to make sure it is “what [he] consider[s] complete.”⁸⁰ Not only that, but Brunson would, “[a]fter orientation, again, walk the project, just making sure that...all the rules are being followed.”⁸¹ If Brunson saw a contractor doing something unsafe or not presented in a JHA, Brunson had the authority to tell them to stop work immediately.⁸² Brunson admitted that he exercised that control in that if he saw a subcontractor’s employee violating OSHA rules creating a danger like a major fall hazard, he would instruct them to stop.⁸³

Similarly, David Briones, assistant superintendent for this job at Hunt,⁸⁴ acknowledged that his job for Hunt was to “coordinate subcontractors,” “schedule activities on the job site,” communicate with representatives from the subcontractor, tell the subcontractors “when to start, where to start, ...what specific tasks we want in each area, the amount of manpower...,” and importantly, to “determin[e]

⁷⁴ Deposition of Jukarylton Brunson at 12:20-24 (Sept. 5, 2013), attached as Ex. J.

⁷⁵ Deposition of Jukarylton Brunson at 15:8-13 (Sept. 5, 2013), attached as Ex. J.

⁷⁶ Deposition of Jukarylton Brunson at 32:21-25 (Sept. 5, 2013), attached as Ex. J.

⁷⁷ Deposition of Jukarylton Brunson at 16:14-18 (Sept. 5, 2013), attached as Ex. J.

⁷⁸ Deposition of Jukarylton Brunson at 16:19-25 (Sept. 5, 2013), attached as Ex. J.

⁷⁹ Deposition of Jukarylton Brunson at 19:12-20:8 (Sept. 5, 2013), attached as Ex. J.

⁸⁰ Deposition of Jukarylton Brunson at 21:3-10 (Sept. 5, 2013), attached as Ex. J.

⁸¹ Deposition of Jukarylton Brunson at 24:4-13 (Sept. 5, 2013), attached as Ex. J.

⁸² Deposition of Jukarylton Brunson at 34:1-15 (Sept. 5, 2013), attached as Ex. J.

⁸³ Deposition of Jukarylton Brunson at 123:4-21 (Sept. 5, 2013), attached as Ex. J.

⁸⁴ Deposition of David Briones at 12:22-13:4 (Sept. 5, 2013), attached as Ex. F.

whether or not the conditions of the work site were safe for work to be done that day.”⁸⁵ Briones emphasized that Hunt as the general contractor had the right to stop work.⁸⁶ He specifically stated that where subcontractors acted in a wrong manner, it was Hunt’s “duty” and “job” to correct it.⁸⁷ However, Briones also acknowledged that he had not read Hunt’s own safety manual or undergone any training on the safety manual.⁸⁸ Briones admitted that there was no excuse for not following OSHA regulations or Hunt safety regulations.⁸⁹ Briones admitted that as a Hunt Supervisor, it was part of his job “to see that OSHA rules and regulations were followed by the subcontractors on the job site when known.”⁹⁰ It was also part of his job as he walked through the job site to “look for dangers or violations of OSHA rules and regulations,” at which time he would immediately go to them and make them stop work.⁹¹ For example, on this very job, Briones stated that he frequently had to correct subcontractor’s employees for violating the “ladder rule” regarding which steps of a ladder workers could use for fall hazards.⁹² Briones also acknowledged that the dismantling of a tower crane is a very dangerous period of work for the workers.⁹³

Importantly, Hunt was on notice that Harrison Hoist was not equipped to perform this very dangerous work. In fact, Harrison had already committed two “near miss” safety incidents/violations – one of which actually did result in an injury⁹⁴ - that triggered Hunt to require a crane coordinator from

⁸⁵ Deposition of David Briones at 13:5-19 (Sept. 5, 2013), attached as Ex. F.

⁸⁶ Deposition of David Briones at 77:8-18 (Sept. 5, 2013), attached as Ex. F.

⁸⁷ Deposition of David Briones at 19:15-20:1, 20:15-18 (Sept. 5, 2013), attached as Ex. F.

⁸⁸ Deposition of David Briones at 96:11-19 (Sept. 5, 2013), attached as Ex. F.

⁸⁹ Deposition of David Briones 138:17-139:2 (Sept. 5, 2013), attached as Ex. F.

⁹⁰ Deposition of David Briones 92:5-19 (Sept. 5, 2013), attached as Ex. F.

⁹¹ Deposition of David Briones 92:24-93:5 (Sept. 5, 2013), attached as Ex. F.

⁹² Deposition of David Briones 99:4-100:16 (Sept. 5, 2013), attached as Ex. F.

⁹³ Deposition of David Briones 94:24-95:5 (Sept. 5, 2013), attached as Ex. F.

⁹⁴ Deposition of Jukarylton Brunson at 135:5-136:5 (Sept. 5, 2013), attached as Ex. J.

Harrison.⁹⁵ These “near misses” caused Hunt to have “concern about the safety or welfare” of the workers on the project.⁹⁶

Harrison Hoist was required to submit a job safety/hazard analysis to Hunt prior to beginning work on the crane.⁹⁷ Hunt required subcontractors performing work of six feet or greater to develop a separate written fall protection work plan “tailored to the scope of their work, identifying hazards and abatement methods to be used related to that work.”⁹⁸ Without filling out a JSA/JHA, Hunt had the ability to prevent Harrison from performing any work.⁹⁹ Further, Hunt required Harrison to prepare a site-specific safety plan.¹⁰⁰ The JHS were to be used “to assure each different type of work task is performed safely.”¹⁰¹ Hunt also conducted a meeting with Harrison specifically about its safety rules in dismantling a crane.¹⁰²

Hunt admitted in discovery that it retained the ability to terminate or remove subcontractors’ employees due to a gross safety violation.¹⁰³ Hunt further admitted that it had the ability to order Harrison to stop any work that Hunt deemed unsafe until corrective measures acceptable to Hunt were implemented.¹⁰⁴ In fact, Hunt actually did stop Harrison from working on this crane at one point because Keller as Harrison’s safety representative was not present.¹⁰⁵ Keller emphasized that he understood if a Hunt safety representative saw something being done unsafely with the dismantling of

⁹⁵ Deposition of David Briones 145:20-146:12, 147:16-24 (Sept. 5, 2013), attached as Ex. F; Deposition of Jukarylton Brunson at 96:15-97:17 (Sept. 5, 2013), attached as Ex. J.

⁹⁶ Deposition of David Briones 145:20-25 (Sept. 5, 2013), attached as Ex. F.

⁹⁷ Deposition of David Briones at 67:22-25 (Sept. 5, 2013), attached as Ex. F; Harrison Crane & Hoist Job Hazard Analysis (July 7, 2012), attached at Ex. I.

⁹⁸ Stage 1 Demolition / Utility Relocation Project Safety Program at (Harrison 593) (Jul. 15, 2011), attached as Ex. O.

⁹⁹ Deposition of David Briones at 69:18-23 (Sept. 5, 2013), attached as Ex. F.

¹⁰⁰ Deposition of David Briones at 71:16-72:5 (Sept. 5, 2013), attached as Ex. F.

¹⁰¹ Stage 1 Demolition / Utility Relocation Project Safety Program at 12 (Jul. 15, 2011), attached as Ex. O.

¹⁰² Deposition of Jack Keller at 63:6-11 (Feb. 10, 2014), attached as Ex. H.

¹⁰³ Hunt’s Objections and Responses to Plaintiffs’ First Request for Admissions, Response No. 10 (Sept. 4, 2013).

¹⁰⁴ Hunt’s Objections and Responses to Plaintiffs’ First Request for Admissions, Response No. 19 (Sept. 4, 2013).

¹⁰⁵ Deposition of David Briones at 29:22-31:17, 32:12-16 (Sept. 5, 2013), attached as Ex. F; Deposition of Jukarylton Brunson at 42:21-43:19 (Sept. 5, 2013), attached as Ex. J; ¹⁰⁵ Deposition of Robert Olsen at 21:1-22 (Sept. 6, 2013), attached as Ex. P.

the crane, Hunt could stop Harrison's work.¹⁰⁶ He further testified that both Hunt and Harrison "ha[d] joint responsibility to make sure that the work being done on July 7th was done safely."¹⁰⁷ If a Hunt representative saw something being performed unsafely, Hunt had the power to stop work.¹⁰⁸ Keller stated that in his experience, a general contractor's duty is to make sure the subcontractor's work is being done safely.¹⁰⁹

Plaintiff's liability expert Jeff York concurred with OSHA's findings on violations and further opines that Hunt, [t]he prime contractor for this project was ultimately responsible for monitoring the JHA to ensure that all subcontractors comply and to provide a safe workplace."¹¹⁰ 29 C.F.R. 1926.16 specifically states that while a contractor and subcontractors may make contractual arrangements allocating certain responsibilities:

"[I]n no case shall the prime contractor be relieved of overall responsibility for compliance. By contractor for full performance of a contract...the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part...Where joint responsibility exists, both the prime contractor and his subcontractor...shall be considered subject to the enforcement provisions of the Act."¹¹¹

York noted that the fact that the prime contractor's failure to recognize the excessive removal of bolts proved that Hunt's supervision was not trained adequately to oversee this type of operation.¹¹² York opines that Weaver's tragic death was caused by the negligence and gross negligence of Harrison and Hunt, disregarding the manufacturers' manuals, the JHA, proper crane safety training, OSHA

¹⁰⁶ Deposition of Jack Keller at 53:16-23 (Feb. 10, 2014), attached as Ex. H.

¹⁰⁷ Deposition of Jack Keller at 53:5-13 (Feb. 10, 2014), attached as Ex. H.

¹⁰⁸ Deposition of Jack Keller at 53:16-23 (Feb. 10, 2014), attached as Ex. H.

¹⁰⁹ Deposition of Jack Keller at 58:13-25 (Feb. 10, 2014), attached as Ex. H.

¹¹⁰ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q.

¹¹¹ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q, citing 29 C.F.R. 1926.16.

¹¹² Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q.

Subpart CC-Cranes and Derricks in Construction, ASME B30.3 and Hunt's own standard policies and procedures.¹¹³

Hunt complains in its motion for summary judgment that the facts do not merit a jury question on its liability. But as Plaintiffs demonstrate, the contractual documents, OSHA violations, expert opinions, testimony of Harrison employees, and testimony of Hunt employees themselves make it clear that Hunt is a proper defendant. Having retained and exercised control over Harrison's safety, Hunt cannot now leap back and claim no responsibility. Plaintiffs respectfully request that the Court deny Hunt's motion for summary judgment.

STANDARD OF REVIEW

Traditional Motion for Summary Judgment.

A defendant is entitled to summary judgment on a plaintiff's cause of action if the defendant can disprove at least one element of the cause of action as a matter of law.¹¹⁴ The defendant has the burden of showing that no genuine issue of material fact exists and that he is entitled to summary judgment as a matter of law.¹¹⁵ The Court must accept all evidence favorable to the plaintiff as true.¹¹⁶ Every reasonable inference must be indulged in favor of the plaintiff and all doubts resolved in his favor.¹¹⁷ The plaintiff need not respond to the motion for summary judgment unless the movant meets its burden of proof.¹¹⁸ But if the defendant meets its burden of proof, the plaintiff must present evidence to raise a fact issue.¹¹⁹

¹¹³ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q.

¹¹⁴ *Sw. Elec. Power Co. v. Grant*, 73 S.W. 3d 211, 215 (Tex. 2002).

¹¹⁵ *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

¹¹⁶ *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985).

¹¹⁷ *Grinnell*, 951 S.W.2d at 425.

¹¹⁸ *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999).

¹¹⁹ *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 197 (Tex. 1995).

No-Evidence Motion for Summary Judgment.

In a no-evidence motion for summary judgment, a defendant can challenge a plaintiff to produce evidence to support one or more elements of the plaintiff's cause of action on which the plaintiff would have the burden of proof at trial after an adequate time for discovery has passed.¹²⁰ To avoid a no-evidence summary judgment, the plaintiff is not required to marshal its proof; the plaintiff only needs to point out evidence that raises a fact issue on the elements challenged in the defendant's motion.¹²¹ To raise a genuine issue of material fact, the plaintiff must produce more than a scintilla of evidence in support of the challenged elements.¹²² More than a scintilla of evidence is produced if the evidence is sufficient to allow reasonable and fair-minded people to differ in their conclusions on whether the challenged fact exists.¹²³ In evaluating whether more than a scintilla of evidence exists, the court must view the evidence in the light most favorable to the plaintiff, crediting evidence favorable to the plaintiff if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.¹²⁴

Summary Judgment Evidence

Exhibit A: Terex Crane Incident Peiner SK415 Investigation Report

Exhibit B: Hurst Metallurgical Research Laboratory, Inc. Preliminary Investigation

Exhibit C: OSHA Citation and Notification of Penalty

Exhibit D: OSHA Investigation No. 508219 (Excerpts)

Exhibit E: Deposition of Alberto Almoguerra

Exhibit F: Deposition of David Briones

Exhibit G: July 7, 2012 Photographs

Exhibit H: Deposition of Jack Keller

Exhibit I: Harrison Crane & Hoist Job Hazard Analysis

Exhibit J: Deposition of Jukarylton Brunson

Exhibit K: Terex Operating Manual (Excerpts)

Exhibit L: Meteorologist Analysis and Meteorological Variable Estimation

Exhibit M: Subcontract Agreement

Exhibit N: Section 01 35 23 Project Safety Requirements

¹²⁰ Tex. R. Civ. P. 166a(i).

¹²¹ *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

¹²² *Smith v. O'Donnel*, 288 S.W.3d 417, 424 (Tex. 2009); *Ford Motor Co. v. Ridgway*, 125 S.W.3d 598, 600 (Tex. 2004).

¹²³ *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).

¹²⁴ *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

Exhibit O: Stage 1 Demolition/Utility Relocation Project Safety Program
Exhibit P: Deposition of Robert Olsen
Exhibit Q: Expert Report of Jeff York

ARGUMENTS AND AUTHORITIES

Hunt makes a standard no-evidence motion for summary judgment and traditional motion for summary judgment on negligence and gross negligence, but primarily focuses on the duty question. Plaintiff will demonstrate that the duty question clearly weighs in Plaintiff's favor, as do the remaining elements of negligence and gross negligence.

Hunt Retained and Exercised Control Over Harrison

Where a general contractor exercises "some control" – not even absolute or total control - over a subcontractor's work, it owes that subcontractor's employees a commensurate duty of care to prevent physical harm.¹²⁵ The question whether a contract gives the right of control is usually a question of law for the court, while the issue of actual control is usually a question of fact for the jury.¹²⁶ In the present case, the Court will first easily see the contractual right of control as a question of law sufficient to deny summary judgment, even setting aside the issue of actual control that is usually a fact question for the jury. However, Plaintiff will demonstrate both.

Retained Control

If a written contract assigns the right to control to the employer, then the plaintiff need not prove an actual exercise of control to establish a duty.¹²⁷ The Restatement and the decisions applying it leave no doubt that Hunt can be liable where it retained some control "to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous to . . . others" and failed to

¹²⁵ *Dyall v. Simpson Pasadena Paper Co.*, 152 S.W.3d 688, 699 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (en banc).

¹²⁶ *Petri v. Kestrel Oil & Gas Properties, L.P.*, 878 F. Supp. 2d 744 (S.D. Tex. 2012).

¹²⁷ *See Pollard v. Mo. Pac. R.R. Co.*, 759 S.W.2d 670, 670 (Tex. 1988) (per curiam).

exercise reasonable care in the exercising that control.¹²⁸ See *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 356-58 (Tex. 1998) (“[t]he duty under [Restatement of Torts (Second)] section 414 is directed to employers who retain a control less than that which is necessary to subject him to liability as a master”). Further, control based on a contract between a contractor and its subcontractor need not even be exercised to satisfy the contractual control test.¹²⁹

In the present case, Hunt very clearly retained contractual control over the subcontractor’s safety efforts. In fact, it was required to do so as a part of its acquiring the UT Dallas job. The “Project Safety Requirements” with UT Dallas required that “[t]he Contractor (Hunt) shall bear overall responsibility for all aspects of safety at the Project.”¹³⁰ The project safety coordinator role for Hunt specifically “include[d] authority to direct actions of subcontractors and to stop work operation whenever any worker is exposed to a risk that can be reduced or eliminated.”¹³¹ Hunt stated that it would “not accept substandard safety performance from any entity, either by group or individual, that would sacrifice the safety of a worker,”¹³² and that “[i]t shall be a goal of all levels of management and supervision to instill a safety culture that will encourage all workers onside to take pride in the fact that they are on a project that is committed to their safety.”¹³³ While Hunt now wishes to disclaim any responsibility for subcontractors, at the time it bid for the UT Dallas job, Hunt specifically represented that, “[a]t

¹²⁸ *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001) (“[t]he general contractor’s duty of care is commensurate with the control it retains over the independent contractor’s work”). The full text of comment (a) reads: “If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.” RESTATEMENT (SECOND) OF TORTS §414 cmt. a.

¹²⁹ *Abarca v. Scott Morgan Residential, Inc.*, 305 S.W.3d 110, 123 (Tex. App. – Houston [1st Dist.] 2009) (“[i]f the right of control over work details has a contractual basis, the circumstance that no actual control was exercised will not absolve the general contractor of liability”).

¹³⁰ Section 01 35 23 – Project Safety Requirements at 1.4.1 (Apr. 20, 2009), attached as Ex. N.

¹³¹ Section 01 35 23 – Project Safety Requirements at 3.2.2 (Apr. 20, 2009), attached as Ex. N.

¹³² Stage 1 Demolition / Utility Relocation Project Safety Program at “Forward” (Jul. 15, 2011), attached as Ex. O.

¹³³ Stage 1 Demolition / Utility Relocation Project Safety Program at “Forward” (Jul. 15, 2011), attached as Ex. O.

Hunt...protecting the public, subcontractor employees, and our employees are the most important part of any work we do.”¹³⁴ Hunt promised to “meet or exceed applicable standards, including...Current OSHA CFR 29 1926 including 11-8-2010 OSHA 1926.550 Update For Cranes.”¹³⁵

In its contract with Harrison, Hunt retained virtually every right that could be exercised over subcontractor safety, including the powers to:

- **Order Harrison to remove any Harrison employee that Hunt deemed to be unsatisfactory;**¹³⁶
- **Approve Harrison’s staff for the job after review of their qualifications;**¹³⁷
- **Require Harrison to submit a “submittal log and schedule, which shall be updated weekly, showing the status of all required shop drawings, samples, and other required submittals”;**¹³⁸
- **Require Harrison to submit a safety plan;**¹³⁹
- **Order Harrison to stop any work that Hunt deems unsafe until corrective measures acceptable to Hunt have been implemented;**¹⁴⁰
- **Modify the project schedule;**¹⁴¹
- **Require a daily report form completed every working day;**¹⁴²
- **Order Harrison to increase its manpower;**¹⁴³ and
- **Require drug testing.**¹⁴⁴

Harrison was also required to submit a job safety/hazard analysis to Hunt prior to beginning work on the crane.¹⁴⁵ Hunt required subcontractors performing work of six feet or greater to develop a separate written fall protection work plan “tailored to the scope of their work, identifying hazards and

¹³⁴ Stage 1 Demolition / Utility Relocation Project Safety Program at 3 (Jul. 15, 2011), attached as Ex. O.

¹³⁵ Stage 1 Demolition / Utility Relocation Project Safety Program at 3 (Jul. 15, 2011), attached as Ex. O.

¹³⁶ Subcontract Agreement at 11.1 (Nov. 7, 2011), attached as Ex. M.

¹³⁷ Subcontract Agreement at 11.3 (Nov. 7, 2011), attached as Ex. M.

¹³⁸ Subcontract Agreement at 12.1 (Nov. 7, 2011), attached as Ex. M.

¹³⁹ Subcontract Agreement at 25.1 (Nov. 7, 2011), attached as Ex. M.

¹⁴⁰ Subcontract Agreement at 25.1 (Nov. 7, 2011), attached as Ex. M (along with a self-serving sentence that exercise of this control should not be construed as control).

¹⁴¹ Subcontract Agreement at 9.4 (Nov. 7, 2011), attached as Ex. M.

¹⁴² Subcontract Agreement at 9.6 (Nov. 7, 2011), attached as Ex. M.

¹⁴³ Subcontract Agreement at 9.7 (Nov. 7, 2011), attached as Ex. M.

¹⁴⁴ Subcontract Agreement at 25.5 (Nov. 7, 2011), attached as Ex. M.

¹⁴⁵ Deposition of David Briones at 67:22-25 (Sept. 5, 2013), attached as Ex. F; Harrison Crane & Hoist Job Hazard Analysis (July 7, 2012), attached at Ex. I.

abatement methods to be used related to that work.”¹⁴⁶ Without filling out a JSA/JHA, Hunt had the ability to prevent its subcontractors from performing any work.¹⁴⁷ Hunt admitted in discovery that it retained the ability to terminate or remove subcontractors’ employees due to a gross safety violation.¹⁴⁸ Hunt further admitted that it had the ability to order Harrison to stop any work that Hunt deemed unsafe until corrective measures acceptable to Hunt were implemented.¹⁴⁹

Multiple Hunt superintendents had the duty to exercise and did exercise control over subcontractor safety on this job. The Hunt project manager had the responsibility under the project safety program to review the Subcontractors Site Safety Program, to be involved in each pre-construction meeting, to identify hazards and review subcontractor safety programs (which must have met or exceeded Hunt’s, UT Dallas’s, the UT System, and OSHA requirements.”¹⁵⁰ The Hunt superintendent, Robert Olsen,¹⁵¹ had the contractual responsibilities under the project safety program to participate in pre-construction meetings with subcontractors; review subcontractor safety submittals; discuss safety in weekly subcontractor progress meetings; and “assist in enforcing employee and subcontractor safety compliance.”¹⁵² Olsen admitted that one of his job duties was to monitor subcontractors and stop work if it was being done in an unsafe manner.¹⁵³ He specifically admitted he had the duty and the authority to correct unsafe subcontractor behavior.¹⁵⁴

Hunt’s assistant superintendent Briones emphasized that Hunt as the general contractor had the right to stop work.¹⁵⁵ He specifically stated that where subcontractors acted in a wrong manner, it was

¹⁴⁶ Stage 1 Demolition / Utility Relocation Project Safety Program at (Harrison 593) (Jul. 15, 2011), attached as Ex. O.

¹⁴⁷ Deposition of David Briones at 69:18-23 (Sept. 5, 2013), attached as Ex. F.

¹⁴⁸ Hunt’s Objections and Responses to Plaintiffs’ First Request for Admissions, Response No. 10 (Sept. 4, 2013).

¹⁴⁹ Hunt’s Objections and Responses to Plaintiffs’ First Request for Admissions, Response No. 19 (Sept. 4, 2013).

¹⁵⁰ Stage 1 Demolition / Utility Relocation Project Safety Program at 6 (Jul. 15, 2011), attached as Ex. O.

¹⁵¹ Deposition of Robert Olsen at 11:3-7 (Sept. 6, 2013), attached as Ex. P.

¹⁵² Stage 1 Demolition / Utility Relocation Project Safety Program at 7 (Jul. 15, 2011), attached as Ex. O.

¹⁵³ Deposition of Robert Olsen at 16:10-18 (Sept. 6, 2013), attached as Ex. P.

¹⁵⁴ Deposition of Robert Olsen at 16:24-17:6 (Sept. 6, 2013), attached as Ex. P.

¹⁵⁵ Deposition of David Briones at 77:8-18 (Sept. 5, 2013), attached as Ex. F.

Hunt's "duty" and "job" to correct it.¹⁵⁶ Briones admitted that as a Hunt Supervisor, it was part of his job "to see that OSHA rules and regulations were followed by the subcontractors on the job site when known."¹⁵⁷ It was also part of his job as he walked through the job site to "look for dangers or violations of OSHA rules and regulations," at which time he would immediately go to them and make them stop work.¹⁵⁸

And Harrison knew that Hunt retained all these rights. Harrison's assembly/disassembly director Keller emphasized that he understood if a Hunt safety representative saw something being done unsafely with the dismantling of the crane, Hunt could stop Harrison's work.¹⁵⁹ He further testified that both Hunt and Harrison "ha[d] joint responsibility to make sure that the work being done on July 7th was done safely."¹⁶⁰ If a Hunt representative saw something being performed unsafely, Hunt had the power to stop work.¹⁶¹ Keller stated that in his experience, a general contractor's duty is to make sure the subcontractor's work is being done safely,¹⁶² and clearly this job was consistent with that experience.

After review of this testimony, Plaintiff's liability expert Jeff York concurred with OSHA's findings on violations and further opined that Hunt, "[t]he prime contractor for this project was ultimately responsible for monitoring the JHA to ensure that all subcontractors comply and to provide a safe workplace."¹⁶³ 29 C.F.R. 1926.16 specifically states that while a contractor and subcontractors may make contractual arrangements allocating certain responsibilities:

"[I]n no case shall the prime contractor be relieved of overall responsibility for compliance. By contractor for full performance of a contract...the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part...Where joint responsibility exists, both the prime contractor and his

¹⁵⁶ Deposition of David Briones at 19:15-20:1, 20:15-18 (Sept. 5, 2013), attached as Ex. F.

¹⁵⁷ Deposition of David Briones 92:5-19 (Sept. 5, 2013), attached as Ex. F.

¹⁵⁸ Deposition of David Briones 92:24-93:5 (Sept. 5, 2013), attached as Ex. F.

¹⁵⁹ Deposition of Jack Keller at 53:16-23 (Feb. 10, 2014), attached as Ex. H.

¹⁶⁰ Deposition of Jack Keller at 53:5-13 (Feb. 10, 2014), attached as Ex. H.

¹⁶¹ Deposition of Jack Keller at 53:16-23 (Feb. 10, 2014), attached as Ex. H.

¹⁶² Deposition of Jack Keller at 58:13-25 (Feb. 10, 2014), attached as Ex. H.

¹⁶³ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q.

subcontractor...shall be considered subject to the enforcement provisions of the Act.”¹⁶⁴

The contractual documents, Hunt’s policies, and the testimony of the involved parties makes it clear that Hunt retained control over Harrison’s safety program, including specifically over the dismantling of the crane (given the JHA submission). As a result, Hunt clearly had a duty to Terry Weaver to act reasonably in the exercise of that duty.

Hunt Exercised Control

It is clear that Hunt retained control over Harrison’s safety program on the dismantling of the crane, which is sufficient to defeat summary judgment. However, even further – Hunt exercised that control, as the testimony of its employees demonstrates. Jukarylton Brunson, safety manager with Hunt,¹⁶⁵ admitted that his daily inspection of a work site is to “mak[e] sure that everybody is following the rules...jobsite rules...OSHA regulations, company policies, things like that.”¹⁶⁶ He specifically stated, “[a]gain, I do monitor the work of the subcontractors onsite.”¹⁶⁷ He emphasized when he ensures that workers are following the rules that he meant “everybody that walks onsite,” not merely Hunt employees.¹⁶⁸ He specifically stated that this included the subcontractors and the work that they were performing, as well as whether the job in general was OSHA-compliant.¹⁶⁹ Brunson testified that Hunt conducted a daily safety orientation for all contractors.¹⁷⁰ Brunson also testified that he reviewed the job hazard analysis to make sure it is “what [he] consider[s] complete.”¹⁷¹ Not only that, but Brunmson would, “[a]fter orientation, again, walk the project, just making sure that...all the rules are being

¹⁶⁴ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q, citing 29 C.F.R. 1926.16.

¹⁶⁵ Deposition of Jukarylton Brunson at 12:20-24 (Sept. 5, 2013), attached as Ex. J.

¹⁶⁶ Deposition of Jukarylton Brunson at 15:8-13 (Sept. 5, 2013), attached as Ex. J.

¹⁶⁷ Deposition of Jukarylton Brunson at 32:21-25 (Sept. 5, 2013), attached as Ex. J.

¹⁶⁸ Deposition of Jukarylton Brunson at 16:14-18 (Sept. 5, 2013), attached as Ex. J.

¹⁶⁹ Deposition of Jukarylton Brunson at 16:19-25 (Sept. 5, 2013), attached as Ex. J.

¹⁷⁰ Deposition of Jukarylton Brunson at 19:12-20:8 (Sept. 5, 2013), attached as Ex. J.

¹⁷¹ Deposition of Jukarylton Brunson at 21:3-10 (Sept. 5, 2013), attached as Ex. J.

followed.”¹⁷² If Brunson saw a contractor doing something unsafe or not presented in a JHA, Brunson had the authority to tell them to stop work immediately.¹⁷³ Brunson admitted that he exercised that control in that if he saw a subcontractor’s employee violating OSHA rules creating a danger like a major fall hazard, he would instruct them to stop.¹⁷⁴ In fact, Hunt actually did stop Harrison from working on this crane at one point because Keller as Harrison’s safety representative was not present.¹⁷⁵

Similarly, David Briones, assistant superintendent for this job at Hunt,¹⁷⁶ acknowledged that his job for Hunt was to “coordinate subcontractors,” “schedule activities on the job site,” communicate with representatives from the subcontractor, tell the subcontractors “when to start, where to start, ...what specific tasks we want in each area, the amount of manpower...,” and importantly, to “determin[e] whether or not the conditions of the work site were safe for work to be done that day.”¹⁷⁷

Further, Hunt required Harrison to prepare a site-specific safety plan.¹⁷⁸ The JHS were to be used “to assure each different type of work task is performed safely.”¹⁷⁹ Hunt also conducted a meeting with Harrison specifically about its safety rules in dismantling a crane.¹⁸⁰

Hunt also exercised control over weather monitoring, which is a crucial safety step in dismantling tower cranes. OSHA noted that “dark clouds” were visible as early as 3:06 pm in photographs of the dismantling in the very pictures Hunt agents took.¹⁸¹ OSHA’s investigation

¹⁷² Deposition of Jukarylton Brunson at 24:4-13 (Sept. 5, 2013), attached as Ex. J.

¹⁷³ Deposition of Jukarylton Brunson at 34:1-15 (Sept. 5, 2013), attached as Ex. J.

¹⁷⁴ Deposition of Jukarylton Brunson at 123:4-21 (Sept. 5, 2013), attached as Ex. J.

¹⁷⁵ Deposition of David Briones at 29:22-31:17, 32:12-16 (Sept. 5, 2013), attached as Ex. F; Deposition of Jukarylton Brunson at 42:21-43:19 (Sept. 5, 2013), attached as Ex. J; ¹⁷⁵ Deposition of Robert Olsen at 21:1-22 (Sept. 6, 2013), attached as Ex. P.

¹⁷⁶ Deposition of David Briones at 12:22-13:4 (Sept. 5, 2013), attached as Ex. F.

¹⁷⁷ Deposition of David Briones at 13:5-19 (Sept. 5, 2013), attached as Ex. F.

¹⁷⁸ Deposition of David Briones at 71:16-72:5 (Sept. 5, 2013), attached as Ex. F.

¹⁷⁹ Stage 1 Demolition / Utility Relocation Project Safety Program at 12 (Jul. 15, 2011), attached as Ex. O.

¹⁸⁰ Deposition of Jack Keller at 63:6-11 (Feb. 10, 2014), attached as Ex. H.

¹⁸¹ OSHA Investigation No. 508219 at “Photograph Mounting Sheet”, (excerpts) attached as Ex. D.

demonstrated that by 3:09 pm, “clouds had moved into the area and the sky was dark.”¹⁸² There was never an instruction to cease work prior to the tower crane collapse.

Hunt agents were responsible for monitoring the weather.¹⁸³ Hunt did monitor the weather immediately before and in fact during the crane falling.¹⁸⁴ Immediately before the Crane fell, David Briones, assistant superintendent for this job at Hunt Construction,¹⁸⁵ observed dark clouds rolling into the work area.¹⁸⁶ Photographs Briones took at the scene depict these dark clouds.¹⁸⁷ Hunt protocol required that operations were supposed to stop in the event of rain or wind.¹⁸⁸ Briones agreed that it was important to “continually monitor the weather in order to determine whether or not crane operation could continue.”¹⁸⁹ Jukarylton Brunson, safety manager with Hunt,¹⁹⁰ first noticed the weather because “dirt was flying by” the window of his office.¹⁹¹ He noticed a “pretty heavy wind pick up” and then saw the tower crane fall.¹⁹² Brunson indicated that Hunt first noticed the change in weather immediately before the crane’s fall; however, Keller testified that the conversation with Hunt about the weather took place more than an hour prior to the collapse.¹⁹³ Harrison employees affirmed that Brunson (with Hunt) was responsible for monitoring the weather.¹⁹⁴ However, no action was taken until it was too late.

On multiple fronts, Hunt exercised control over Harrison’s safety programs, and cannot now step away from the results of its action. Having retained and exercised control, Hunt had a duty to exercise that control reasonably.

¹⁸² OSHA Investigation No. 508219 at 4, (excerpts) attached as Ex. D.

¹⁸³ Deposition of Jack Keller at 49:22-50:4 (Feb. 10, 2014), attached as Ex. H; Deposition of Alberto Almoguerra at 95:17-96:2, 128:21-129:11, 29:13-16, 130:15-18 (Feb. 10, 2014), attached as Ex. E.

¹⁸⁴ Deposition of David Briones at 44:1-19 (Sept. 5, 2013), attached as Ex. F.

¹⁸⁵ Deposition of David Briones at 12:22-13:4 (Sept. 5, 2013), attached as Ex. F.

¹⁸⁶ Deposition of David Briones at 46:4-10 (Sept. 5, 2013), attached as Ex. F.

¹⁸⁷ Deposition of David Briones at 55:12-18 (Sept. 5, 2013), attached as Ex. F.

¹⁸⁸ Deposition of David Briones at 75:2-12 (Sept. 5, 2013), attached as Ex. F.

¹⁸⁹ Deposition of David Briones at 78:19-22 (Sept. 5, 2013), attached as Ex. F.

¹⁹⁰ Deposition of Jukarylton Brunson at 12:20-24 (Sept. 5, 2013), attached as Ex. J.

¹⁹¹ Deposition of Jukarylton Brunson at 57:21-22 (Sept. 5, 2013), attached as Ex. J.

¹⁹² Deposition of Jukarylton Brunson at 60:1-23 (Sept. 5, 2013), attached as Ex. J.

¹⁹³ Deposition of Jack Keller at 78:9-25 (Feb. 10, 2014), attached as Ex. H.

¹⁹⁴ Deposition of Alberto Almoguerra at 95:17-96:2, 128:21-129:11, 29:13-16, 130:15-18 (Feb. 10, 2014), attached as Ex. E.

Hunt Breached its Duties

Hunt did not exercise its duties reasonably. No written procedures were provided to the Harrison laborers for proper disassembly of the crane by Hunt.¹⁹⁵ Jack Keller, Harrison's crane dismantling supervisor, did not recall Hunt inquiring about whether Harrison's agents were trained at all on the new OSHA regulations applying to dismantling the crane.¹⁹⁶ However, Briones (Hunt's own assistant superintendent) also acknowledged that he had not even read Hunt's own safety manual or undergone any training on the safety manual.¹⁹⁷ Briones admitted that there was no excuse for not following OSHA regulations or Hunt safety regulations.¹⁹⁸ Plaintiff's liability expert York agreed, noting that the fact that the prime contractor's failure to recognize the excessive removal of bolts proved that Hunt's supervision was not trained adequately to oversee this type of operation.¹⁹⁹ York opines that Weaver's tragic death was caused by the negligence and gross negligence of Harrison and Hunt, disregarding the manufacturers' manuals, the JHA, proper crane safety training, OSHA Subpart CC-Cranes and Derricks in Construction, ASME B30.3 and Hunt's own standard policies and procedures.²⁰⁰ A job hazard analysis ("JHA") was in fact submitted to Hunt by Harrison for the dismantling of the subject crane.²⁰¹ This JHA specifically referenced "untorquing" of the bolts, and referred to the manufacturer's manual for the tower crane.²⁰² The operating manual for this crane provides instructions on the dismantling of the tower sections.²⁰³ This manufacturer's manual for the tower crane was actually kept in Hunt's safety manager's office.²⁰⁴ OSHA noted that the manufacturer instructs that "the connecting elements (mast

¹⁹⁵ Hurt Metallurgical Research Laboratory, Inc. Preliminary Investigation at ¶1.4, attached as Ex. B.

¹⁹⁶ Deposition of Jack Keller at 45:2-10 (Feb. 10, 2014), attached as Ex. H.

¹⁹⁷ Deposition of David Briones at 96:11-19 (Sept. 5, 2013), attached as Ex. F.

¹⁹⁸ Deposition of David Briones 138:17-139:2 (Sept. 5, 2013), attached as Ex. F.

¹⁹⁹ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q.

²⁰⁰ Expert Report of Jeff York at 4 (Mar. 3, 2014), attached as Ex. Q.

²⁰¹ Ex. 3 to Brunson's Depo.

²⁰² Deposition of Jukarylton Brunson at 30:16-31:9 (Sept. 5, 2013), attached as Ex. J.

²⁰³ Terex Operating Manual at 08.64 (Harrison 458), (excerpts) attached as Ex. K.

²⁰⁴ Deposition of Jukarylton Brunson at 107:7-9 (Sept. 5, 2013), attached as Ex. J.

bolts) are to be removed between the tower section which is to be dismantled and the tower section which is placed underneath,” which obviously would have prevented Mr. Weaver’s death.²⁰⁵ Rather than reasonably exercising its duties to provide a safe workplace, Hunt kept its head in the sand until it was too late.

Causation

Hunt only challenges causation in a brief one-line portion of its no-evidence motion for summary judgment, and does not mount any significant opposition to causation in its motion. Proximate causation embraces two concepts, both of which must be present: the cause-in-fact of an event and the foreseeability of that event.²⁰⁶ Cause-in-fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred.²⁰⁷ Because the foreseeability prong of proximate cause is inherently a matter to be left to the fact finder, it is problematic for summary judgment review.²⁰⁸ “Whether a particular act of negligence is a cause-in-fact of an injury is a particularly apt question for jury determination.”²⁰⁹ Causation does not have to be supported by direct evidence; circumstantial evidence and inferences drawn therefrom will sufficiently support a finding of causation.²¹⁰ The trier of fact is afforded broad latitude to infer proximate cause from the evidence and circumstances surrounding an accident, especially when it is not possible to produce direct proof of proximate cause.²¹¹

²⁰⁵ OSHA Investigation No. 508219 at 4, (excerpts) attached as Ex. D.

²⁰⁶ *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975).

²⁰⁷ *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995); *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995).

²⁰⁸ *Taylor v. Southwestern Bell Tel. Co.*, 483 S.W.2d 330, 332 (Tex. Civ. App.—El Paso 1972, no writ); *Hall v. Huff*, 957 S.W.2d 90, 96 (Tex. App.—Texarkana 1997, pet. denied).

²⁰⁹ *Rio Grande Reg'l Hosp., Inc. v. Villarreal*, 329 S.W.3d 594, 608 (Tex. Civ. App.—Corpus Christi 2010, pet. granted), citing *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 756 (Tex. 1975) and *Tex. Dep't of Transp. v. Pate*, 170 S.W.3d 840, 848 (Tex. App.—Texarkana 2005, pet. denied).

²¹⁰ See *Havner v. E Z Mart Stores, Inc.*, 825 S.W.2d 456, 459 (Tex. 1992); *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987).

²¹¹ *J.K. & Susie Wadley Research Inst. & Blood Bank v. Beeson*, 835 S.W.2d 689, 698 (Tex. App.—Dallas 1992, writ denied) (citing *Harris v. Laquinta-Redbird Joint Venture*, 522 S.W.2d 232, 236 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.)).

Further, more than one action may be the proximate cause of the same injury.²¹² Negligence of one does not excuse the negligence of another.²¹³ Where both the actor's negligent conduct and that of a third person bring about the injury, the rule of concurrent causation applies.²¹⁴ All persons who contribute to the injury are liable. *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644, 655 (Tex. Civ. App.—Corpus Christi 1993, writ dism'd by agr.).²¹⁵

After its own investigation, OSHA found several violations causative to these deaths, including:

- A serious violation that the assembly/disassembly director supervising the assembly/disassembly operation did not address the hazards associated with the operation, including the effect of wind speed and weather on the equipment;²¹⁶
- A serious violation for failure to use manufacturer procedures for assembly/disassembly, which did not prevent unintended dangerous movement and collapse of the mast, provide adequate support and stability to the mast, or minimize workers' exposure to collapse of the crane;²¹⁷ and
- A serious violation for using employer procedures not developed by a qualified person (a professional engineer, including an engineering analysis of all existing and potential forces).²¹⁸
- Serious violation for failure to train workers regarding the requirements of OSHA crane regulations applicable to their respective roles;²¹⁹

As demonstrated above, Hunt retained control over each of these issues and breached its duties to reasonably exercise that control. Those breaches caused Terry Weaver's death, as OSHA found.

²¹² *Brookshire Bros., Inc. v. Lewis*, 911 S.W.2d 791, 793 (Tex. Civ. App.—Tyler 1995, writ denied).

²¹³ *Id.*; RESTATEMENT (SECOND) OF TORTS § 439 (1977).

²¹⁴ See *Atchison v. Texas & Pac. Ry.*, 143 Tex. 466, 186 S.W.2d 228, 231 (1945).

²¹⁵ *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644, 655 (Tex. Civ. App.—Corpus Christi 1993, writ dism'd by agr.). While Hunt did not raise the issue of intervening or superseding cause, "[t]he intervening cause of the plaintiff's injuries, even if unforeseeable, may be a concurring cause if the chain of causation flowing from the defendant's original negligence is continuous and unbroken." *Henry v. Houston Lighting & Power Co.*, 934 S.W.2d 748, 753 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Further, the Texas Supreme Court has consistently held that the intervention of an even unforeseen or unexpected cause will not be sufficient to relieve the original wrongdoer from the natural consequences of their negligence if, "such negligence directly and proximately co-operates with the other cause of the resulting injury" *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 153 S.W.2d 442, 448 (1941); *Atchison v. Texas & Pacific Ry. Railroad Co.*, 143 Tex. 466, 186 S.W.2d 228, 232 (1944).

²¹⁶ OSHA Citation and Notification of Penalty at 6 (Nov. 20, 2012), attached as Ex. C.

²¹⁷ OSHA Citation and Notification of Penalty at 7-9 (Nov. 20, 2012), attached as Ex. C.

²¹⁸ OSHA Citation and Notification of Penalty at 10 (Nov. 20, 2012), attached as Ex. C; OSHA Investigation No. 508219 at 2, (excerpts) attached as Ex. D.

²¹⁹ OSHA Citation and Notification of Penalty at 11 (Nov. 20, 2012), attached as Ex. C.

As to damages, while Hunt refers to Plaintiff's "claimed injuries,"²²⁰ there is no question that Terry Weaver suffered a terrible and gruesome death as a result of this crane collapse. Hunt's motion for summary judgment on damages is without merit, to say the least.

Gross Negligence

Hunt's final ground for summary judgment is one sentence stating in essence that, "...[b]ecause summary judgment in favor of Defendant is proper on the negligence claims, summary judgment in Defendant's favor (*sic*) on the gross negligence claims as well." *See Hunt's Motion* at 5, 8-9. Hunt did not specifically challenge any elements of Plaintiff's gross negligence claim as required by the rule, and thus Hunt's no-evidence motion for summary judgment on gross negligence is invalid.²²¹ Hunt's argument appeared not to be that its conduct did not reach the level of gross negligence, but that because the Court should dismiss Plaintiff's negligence claims on duty grounds, the gross negligence claims should also be dismissed in a sort of domino train. However, as demonstrated *supra*, Plaintiffs' negligence claims must survive summary judgment, Plaintiffs' gross negligence claims must survive summary judgment as well.

Prayer

WHEREFORE, Plaintiffs respectfully pray that after review of the pleadings, authorities of law, and evidence, that the Court deny Hunt's Motion and grant such other and further relief to which Plaintiffs may be justly entitled.

²²⁰ Hunt's Motion at 5.

²²¹ Tex. R. Civ. Pro. 166a(i) ("The motion must state the elements as to which there is no evidence.").

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing instrument has been furnished to all known counsel of record via EFILE on this 21st day of April, 2014.



RONNIE TURNER, JR.



LAW FIRM L.L.P.

JENNIFER JOB SEALE
ATTORNEY

April 21, 2014

Mr. Gary Fitzsimmons
District Clerk, Dallas County
600 Commerce Street, Suite 103
Dallas, Texas 75202

VIA EFILE

Re: Cause No. DC-1211591; *Tammy Weaver, Individually and as Representative of the Estate of Terry Weaver, Deceased and Derek Weaver vs. Harrison Hoist, Inc., doing business as Harrison Crane & Hoist, Inc., Hunt Construction Group*; In the 68th District Court of Dallas County, Texas

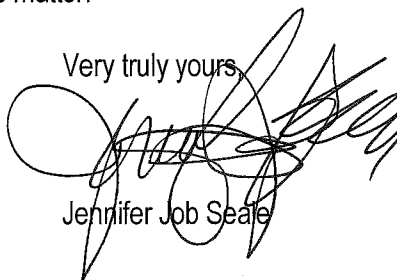
Dear Mr. Fitzsimmons:

Enclosed please find Plaintiffs' Response to Defendant Hunt Construction Group's Hybrid Motion for Summary Judgment.

By copy of this letter, all known counsel of record is being provided with a copy of same.

Thank you for your cooperation in this matter.

Very truly yours,



Jennifer Job Seale

JJS:gm
Enclosures

Pc: Mr. Mike Miller (VIA EFILE)
Mr. John Pease (VIA EFILE)
Mr. Rick Freeman (VIA EFILE)

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